IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
SECOND APPEAL NO.527 OF 1991

Shri Sarjerao Abasaheb Barge,
aged about 40 years, Occ:Business,
R/o. 421, Ravivar Peth,
At Post & Tal. Phaltan,
Dist. Satara. Appellant
(Org. Plaintiff)

Vs.

Shrimant Vijaysing Amarsinh
Naik-Nimbalkar,
aged about 40 yrs.,
Occ:Agriculturist,
R/o.Simpi Ali, At Post &
Tal. Phaltan, Dist.Satara. Respondent
(Org.Defendant)

Mr.K.B.Sonwalkar for appellant.
Mr.R.A.Thorat for respondent.

CORAM: B.H. MARLAPALLE, J.

December 23, 2005.

ORAL JUDGMENT:

1. This Second Appeal arises from the judgment and order dated 19th July 1990 passed by the learned Additional District Judge at Satara allowing Regular Civil Appeal No.197 of 1984 whereby the decree passed by the learned Civil Judge Junior Division at Phaltan on 30/6/1984 for the recovery of Rs.8,500/- with interest at the rate of 6 % per annum for future came

to be set aside. While admitting this Second Appeal on 23/10/1991 the issues raised under ground no.(1) came to be framed as substantial questions of law and these are Clause (A) to (H) of para no.1 of the appeal memo, reading as under;

(A) Whether the appellant has advanced Rs.8,400/- to the respondent by cheque dated 13th February 1975 drawn on Sangli Bank Ltd., Phaltan as a hand loan amount.

(B) Whether the appellant is entitled to recover the abovesaid amount of Rs.8,400/- and interest at the rate of Rs.6 P.A. per year from the respondent on the amount of Rs.8,400/- from the date of the decree by the trial Court.

(C) Whether the respondent had advanced hand loan of Rs.9000/- to the appellant on 12.2.1975 for doing the repayment of the loan amount by the appellant to the Sangli Bank on that day i.e. 12.2.1975.

(D) Whether the respondent was having sufficient amount on his account to enable him to pay the Rs.9000/- to the appellant in cash on 12th February 1975.

(E) Whether the respondent has proved that he has received Rs.8,400/- by cheque dated 13th February 1975 and Rs.600/- in cash towards the repayment of the amount which was supposed to be paid by him to the appellant.

(F) That does the respondent prove that the registered notices given by the appellant to him on 2.2.1976 and 21.2.1976 was not true but that notices were given by the appellant to him by way of fun.

(G) Whether the provisions of Section 118 of

the Negotiable Instruments Act, are made applicable to the transaction between the appellant and the respondent of issuing the cheque of Rs.8.400/- on 13th February 1975 by the appellant to the respondent and all the conditions in that section are fulfilled.

(H) Whether the provisions of Section 18 of Indian Evidence Act are properly interpreted and applied by the learned Additional District Judge, while deciding the appeal.

2. The appellant is the plaintiff who filed Regular Civil Suit No.238 of 1976 claiming that he had lent an amount of Rs.8400/- to the defendant by way of hand loan vide cheque no.004561 dated 13-2-1975 drawn with the Sangli Bank, Branch at Phaltan. The said cheque was encashed on 13-2-1975 and for about one year the defendant did not repay the hand loan amount. The plaintiff, therefore, issued legal notices on 2/2/1976 and 21/2/1976 claiming recovery of Rs.8400/- with additional amount of Rs.100/- by way of damages. Left with no other choice he filed the suit on or about 26/3/1976.

. The defendant filed his written statement at Exhibit 29 and opposed the claim for recovery raised by the plaintiff. As per the defendant the plaintiff had borrowed an amount of Rs.9000/- in cash from the defendant on the earlier day i.e. 12/2/1975 to close

the loan account with Sangli Bank so as to renew it for a fresh loan amount of Rs.15,000/- and after the said loan was sanctioned on the very next day the plaintiff issued the cheque for Rs.8400/- and also paid the balance of Rs.600/- in cash to the defendant in discharge of the amount of Rs.9000/- borrowed from the defendant on the earlier day.

3. The plaintiff examined himself as PW 1 whereas the defendant examined himself as DW 1 and six more witnesses viz. Laxman Dhumal @ Deshmukh (DW 2), Achyut Phalke (DW 3), Yashwantrao Yadav (DW 4), Arvind Kulkarni (DW 5), Waman Sargar (DW 6) and Kirankumar Doshi (DW 7). DW 2 Laxman Dhumal was a common friend of the plaintiff and the defendant and was running a coal shop in the premises of defendant as a tenant. He stated that the plaintiff's electrical shop was in front of his coal shop since 1971-72. He was a guarantor to the plaintiff's loan sanctioned by the Sangli Urban Co-op. Bank as well as the Central Bank in 1973. He stated that he had received a notice from the lending bank in 1974 as the plaintiff was irregular in repayment of loan and when pointed out to the plaintiff he assured that he would be regular in repayment of the loan amount. He

further stated that he received such notices on more than one occasions. As per him the plaintiff wanted to renew the loan in 1975 and, therefore, he asked him to remain guarantor again but the witness refused. This witness further stated that the defendant called upon him to remain guarantor for the plaintiff as he was giving Rs.9000/- by way of hand loan. On the next day he went with the defendant to the Sangli Bank and the plaintiff was present there and in his presence the defendant gave to the plaintiff an amount of Rs.9000/- in cash. The plaintiff deposited the same in the Bank and for a fresh loan of Rs.5000/- Bank papers were processed and he signed as a guarantor for the said fresh loan. In his cross-examination he strenuously stated about his regrets for being a guarantor to the plaintiffs. A suggestion was made to him regarding the source of Rs.9000/- paid by the defendant to the plaintiff. His cross-examination remained in-tact on the point that in his presence the defendant had given to the plaintiff an amount of Rs.9000/- in cash on 12/2/1975 in Sangli Bank, Branch at Phaltan between 10-30 to 11-45 a.m.

4. DW 3 Achyut Shankar Phalke was an employee

from the Income Tax Office at Satara and he proved his report dated 26/7/1976 at Exhibit 95. As per the said report he had visited the electrical shop of the plaintiff at Phaltan and noted that the plaintiff was not knowing how to write his account books and, therefore, the account books were not maintained. DW 4 Yashwantrao Yadav was a Clerk in Phaltan Urban Co-op. Bank Ltd. and he produced the extract of the plaintiff's account at Exhibits 97 and 98. DW 5 - Arvind Kulkarni was a Clerk in the Sangli Bank at Phaltan and he confirmed that the plaintiff had a savings account with the said Bank in addition to the loan account which was closed. He produced the loan account extract at Exhibit 100. DW 6 Waman Sargar was Section Incharge in the Accounts Officer of Shriram Sugar Factory to which the defendant and his family had supplied sugar-cane and through his evidence it was proved that in January 1975 the sugar factory had paid an amount of Rs.6,253/- to the defendant, Rs.2,990/- to his brother and Rs.5,356/- to his wife as per bills at Exhibits 106 to 106. DW 7 Kirankumar Doshi was the Manager of the Sangli Bank at Phaltan in December 1979. The plaintiff did not adduce any documentary evidence except the issuance of cheque for an amount of Rs.8400/- which the

defendant had admitted to have withdrawn by encashing the cheque on 13/2/1975.

5. The trial Court was apparently overwhelmed by the fact that the defendant had withdrawn an amount of Rs.8,400/- pursuant to the cheque issued by the plaintiff on 13/2/1975 and as per the trial Court there was no evidence in support of the defendant's case that he had advanced a cash of Rs.9,000/- on 12/2/1975 to the plaintiff as per his request. The trial Court, therefore, rejected the defendant's claim that the amount of Rs.8,400/- given to him by cheque and Rs.600/- by cash by the plaintiff was not by way of repayment of the amount borrowed on the earlier day but the amount of Rs.8,400/- was a hand loan given by the plaintiff to the defendant and he failed to repay the same. The trial Court, therefore, decreed the suit for a claim of Rs.8,500/-.

6. In the appeal filed by the defendant the learned Additional District Judge reappreciated the evidence, oral as well as documentary, and reversed the findings of the trial Court. The evidence of Mr.Dhumal @ Deshmukh has been elaborately considered

hereinabove and he was witness to the cash advance given by the defendant to the plaintiff on 12/2/1975. The reasoning given by the trial Court does not furnish any plausible explanation to discard the testimony of this witness who has been a common friend of both the parties and though a tenant as well as relation of the defendant, was a guarantor for the loans sanctioned to the plaintiff on more than one occasions. He was carrying out his business just opposite the shop of the plaintiff and the testimony of this witness alone was sufficient to dismiss the suit as his depositions in the examination-in-chief remained unshaken in his cross-examination. On assessment of the loan account extracts placed on record from the Sangli Bank, the lower Appellate Court noted that on 13/2/1975 the plaintiff had withdrawn an amount of Rs.600/- in cash and failed to furnish any explanation as to how the said amount was disbursed by him. This circumstance went to prove the contentions of the defendant that on 13/2/1975 the plaintiff returned the amount of Rs.8400/- by cheque and the balance of Rs.600/- by cash so as to discharge the hand loan of Rs.9000/- taken in cash on the earlier day so as to close the old account and obtain fresh loan of Rs.15,000/- on

the very same day. This entire transaction of closing the old account and sanction of the fresh loan has been proved by the testimony of Shri Dhumal @ Deshmukh. The plaintiff while in the witness box could not explain the source of Rs.9000/- that he deposited on 12/2/1975 with the Bank. On the other hand when the fresh cash credit facility was sanctioned to him on 13/2/1975 for Rs.15,000/-, the extract of account at Exhibit 114 showed that the plaintiff had withdrawn an amount of Rs.15,225/- on 1/1/1975 and he deposited an amount of Rs.9,000/- on 12/2/1975 and again on 13/2/1975 he deposited Rs.6566/- by cash. The lower Appellate Court by taking into consideration the bills at Exhibits 104 to 106 concluded that the defendant had with him an amount of more than Rs.9000/- available in cash and, therefore, it accepted the defendant's claim supported by the evidence of Dhumal @ Deshmukh that defendant lent an amount of Rs.9000/- by cash to the plaintiff on 12/2/1975. The evidence also went to show that the Central Bank of India, Phaltan Branch had sanctioned loan to the plaintiff (Exh.100) and he obtained the cash credit facility from the Phaltan Urban Co-operative Bank Ltd. Similarly the Sangli Bank Ltd. also sanctioned him cash credit facility

by hypothecating the goods (Exhibit 114) and the limit of Rs.15,000/- of cash credit facility granted earlier was renewed on 13/2/1975 when the earlier loan account was closed by depositing cash of Rs.9000/- on 12/2/1975 and Rs.6566/-. The Bank Manager Shri Kirankumar Doshi (DW 7) stated in the witness box that the Bank closed the account of the plaintiff and fresh cash credit limit was sanctioned to him on 13/2/1975. The lower Appellate Court, therefore, noted that when the plaintiff himself was borrowing amount from the Bank by renewal of the cash credit facility to run his business, his contention that he lent the hand loan of Rs.8,400/- to the defendant on 13/2/1975 could not be accepted obviously because the plaintiff did not have any surplus money at his hands. The finding recorded by the lower Appellate Court that the amount of Rs.8400/- given by the plaintiff to the defendant by way of cheque on 13/2/1975 was in fact in discharge of the amount borrowed on the earlier day by the plaintiff from the defendant is well supported by the evidence on record and the lower Appellate Court rightly stepped in to correct the error committed by the trial Court in applying its mind to the evidence adduced by the defendant. The decree of the trial

Court was rightly set aside by the lower Appellate Court and the challenge to the decision of the lower Appellate Court is devoid of merits.

7. In the premises this Second Appeal fails and the same is dismissed with costs.

(B.H.MARLAPALLE,J.)